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JUDGMENT

FILED: August 2, 2007

UNITED STATES COURT OF APPEALS

For the

Fourth Circuit

No. 07-1101

8:04-cv-01984-RWT

LAWRENCE K. SILVA, Ph.D.

Plaintiff – Appellant

v.

BOWIE STATE UNIVERSITY, part of the University System of Maryland

Defendant – Appellee

---

Appeal from the United States District Court for the District of Maryland at Greenbelt

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

_____

CLERK

**UNPUBLISHED**
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 07-1101**

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LAWRENCE K. SILVA, Ph.D.,

Plaintiff – Appellant,

versus

BOWIE STATE UNIVERSITY, part of the University System of Maryland,

Defendant – Appellee.

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Appeal from the United States District Court for the District of Maryland, at Greenbelt. Roger W. Titus, District Judge. (8:04-cv-01984-RWT)

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Submitted: July 27, 2007
Decided: August 2, 2007

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Before TRAXLER and KING, Circuit Judges, and WILKINS, Senior Circuit Judge.

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Affirmed by unpublished per curiam opinion.

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Lawrence K. Silva, Appellant Pro Se. John Joseph Curran, Jr., Sara Slaff, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Lawrence K. Silva appeals from the district court's order granting summary judgment in favor of his former employer on Silva's claim of retaliatory discharge. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the court at the hearing held in January 22, 2007. See Silva v. Bowie State Univ., No. 9:04 cv-01984-RWT (D. Md. Jan. 22, 2007; filed Jan. 24, 2007 & entered Jan. 25, 2007). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

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* Silva presents on appeal a letter dated April 15, 2002, that was not before the district court. "It is well established that affidavits and exhibits not before the [district] court in making its decision are not to be considered on appeal." Kaiser Aluminum & Chem. Corp. v. Westinghouse Elec. Corp., 981 F.2d 136, 140 (4th Cir. 1992). In any event, we have reviewed the letter and conclude that it does not warrant relief on appeal.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 21, 2007

No. 07-1101
8:04-cv-01984-RWT

LAWRENCE K. SILVA, Ph.D.
Plaintiff – Appellant

v.

BOWIE STATE UNIVERSITY, part of the University System of Maryland
Defendant – Appellee

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On Petition for Rehearing and Rehearing En Banc

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The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Chief Judge Williams, Judge Traxler, and Judge King.

For the Court,
/s/ Patricia S. Connor

_____
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 1, 2007

No. 07-1101
8:04-cv-01984-RWT

LAWRENCE K. SILVA, Ph.D.
Plaintiff – Appellant

v.

BOWIE STATE UNIVERSITY, part of the University System of Maryland
Defendant – Appellee

---

MANDATE

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The judgment of this Court, entered 8/2/07, takes effect this date.

A certified copy of this Court's judgment and a copy of its decision are issued to the district court and constitute the mandate of this court.

/s/ Patricia S. Connor

CLERK

JUDGMENT

FILED: February 10, 2006

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1760

CA-04-1984-RWT

LAWRENCE K. SILVA, Ph.D.
Plaintiff – Appellant

v.

BOWIE STATE UNIVERSITY, part of the University System of Maryland
Defendant – Appellee

---

Appeal from the United States District Court for the District of Maryland at Greenbelt

---

In accordance with the written opinion of this Court filed this day, the Court affirms in part and vacates in part the judgment of the District Court. This case is remanded to the District Court for further proceedings consistent with the Court's opinion.

A certified copy of this judgment will be provided to the District Court upon issuance of this mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

_____

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 6, 2006

No. 05-1760
CA-04-1984-RWT

LAWRENCE K. SILVA, Ph.D.
Plaintiff – Appellant

v.

BOWIE STATE UNIVERSITY, part of the University System of Maryland
Defendant – Appellee

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MANDATE

---

The judgment of this Court, entered 2/10/06, takes effect this date.

A certified copy of this Court's judgment and a copy of its decision are issued to the district court and constitute the mandate of this Court.

/s/ Patricia S. Connor

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
**No. 05-1760**

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LAWRENCE K. SILVA, Ph.D.
Plaintiff – Appellant

v.

BOWIE STATE UNIVERSITY, part of the University System of Maryland
Defendant – Appellee

---

Appeal from the United States District Court of the District of Maryland, at Greenbelt. Roger W. Titus, District Judge. (CA-04-1984-RWT)

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Submitted: January 25, 2006
Decided: February 10, 2006

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Before WILLIAMS, TRAXLER, and KING, Circuit Judges.

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Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

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Lawrence K. Silva, Appellant Pro Se. Sara Slaff, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellee.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Lawrence K. Silva filed a second amended complaint against Bowie State University ("BSU"), his former employer, alleging that BSU terminated him in retaliation for engaging in protected activity, in violation of Title VII of the Civil Rights Act of 1964, as amended. BSU moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief may be granted. The district court concluded that it need not convert the motion to dismiss to a motion for summary judgment under Fed. R. Civ. P. 56. The court then granted BSU's Rule 12(b)(6) motion, finding that, as a matter of law, BSU's request for Silva to undergo a medical examination was not an adverse employment action. The court also concluded that Silva failed to state a prima facie case of retaliatory discharge, finding that there was no causal connection between his protected activity and the termination because BSU terminated him for refusing to undergo the medical evaluation—not for filing his discrimination complaint. Silva appeals. We affirm in part, vacate in part, and remand for further proceedings.

Silva asserts on appeal that the district court erred by failing to convert the motion to dismiss into a motion for summary judgment and that the court erred by finding that the request for a medical examination was not an adverse employment action. We have reviewed the record and find no reversible error relating to these issues. Accordingly, we affirm these portions of the district court's order for the reasons stated by the court at the hearing held on June 21, 2005. See Silva v. Bowie State Univ., No. CA-04-1984-RWT (D. Md. June 22, 2005).

Next, Silva asserts that district court erred granting BSU's motion to dismiss his retaliatory discharge claim on the grounds that there was no casual connection between the filing of his complaint with BSU's Equal Employment Opportunity ("EEO") officer and the termination and that insubordination was the reason for his termination. We review de novo a Rule 12(b)(6) dismissal, "accept[ing] as true the factual allegations in the light most favorable to the plaintiff." Lambeth v. Bd. Of Comm'rs, 407 F.3d 266, 268 (4th Cir. 2005) (citations omitted). "[A] district court may dismiss a complaint for failure to state a claim only if it appears beyond doubt that the plaintiff can prove not set of facts that would entitle him to relief." Id.

To state a prima facie case of retaliation, Silva must show that (1) he engaged in a protected activity; (2) an adverse employment action was taken against him; and (3) there was a casual connection between the first two elements. Price v. Thompson, 380 F.3d 209, 212 (4th Cir. 2004). In determining whether there is a casual connection between the protected activity and the adverse employment action sufficient to state a prima facie case of retaliation, we have "held that a causal connection ... exists where the employer takes an adverse employment action against an employee shortly after learning of the protected activity." Id. at 213.

Here, Silva contacted the EEO officer on January 26, 2003. BSU terminated him on April 8, 2003—about ten weeks later. Because "[t]he burden of establishing a prima facie case . . . is not onerous," Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981), we find that the ten-week lapse of time sufficiently established a prima facie case of retaliation. See King v. Rumsfeld, 328 F.3d 145, 151 & n.5 (4th Cir. 2003)(concluding

that ten weeks between protected activity and adverse employment action "gives rise to sufficient inference of causation to satisfy the prima facie requirement" but noting that "[t]his length of time . . . is sufficiently long so as to weaken significantly the inference of causation between the two events"). Thus, the district court erred in granting BSU's motion to dismiss Silva's retaliatory discharge claim.

Accordingly, we vacate that portion of the district court's order and remand for further proceedings. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED IN PART
VACATED IN PART
AND REMANDED

**Case No. 07-1101**
**Silva v. Bowie State Univ.**
**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**
**Re: 07-1101 Silva v. Bowie State University**
**APPELLANT'S INFORMAL BRIEF**

**1. Jurisdiction (for appellants only)**

**a.** What is the name of the court from which you are appealing? United States District Court for the District of Maryland (Southern Division)

**b.** What is the date(s) of the order or orders which you are appealing? January 24, 2007 (Decision on which the order is based appears in January 22, 2007 hearing transcript at pp. 30-45, attached)

**2. Timeliness of appeal (for prisoners only)**

When did you give your notice of appeal to a prison officer for mailing to the United States District Court? Enter the exact date:

Not applicable.

**3. Issues on Appeal**

**Use the following spaces to tell the United States Court of Appeals for the Foruth Circuit why the judgment under review should be affirmed, reversed, or vacated and remanded. Appellants must provide a brief summary of the facts and arguments that support their position that the judgment under review was wrong. Appellees may rely on the facts and law stated in that judgment or may advance alternative grounds for affirmance or dismissal. The parties may cite case law, but it is not required.**

Supporting Facts: Appellant is a U.S. citizen of African descent (Nigeria). His ethnic background is Yoruba (a tribe in the western part of Nigeria). His religious affiliation is Southern Baptist. Appellant is 57 years of age. In 2001, Appellant filed an EEO claim against Bowie State University as part of a settlement agreement arising from this prior EEO complaint. The parties executed a settlement agreement and written employment contract. Both agreements provided, among other things, that Appellant would not be required to submit to an independent medical examination. (Copy of agreements attached). Appellant returned to work and complied fully with the terms of agreements, fulfilling his obligations as a tenured associate professor.

When Appellant was again subjected to harassment and a hostile environment, he filed a second EEO complaint with the University's EEO office. Upon reviewing Appellant's EEO claim, Appellee demanded that Appellant submit to an independent medical examination. The imposition of this requirement expressly contravened the terms of the settlement agreement and Appellant's employment contract with the University. Therefore, Appellant refused to submit to the IME. Appellee then terminated Appellant on April 8, 2003.

Appellant timely filed the instant claim with the Maryland Commission for Human Relations. Upon receipt of his Notice of Right to Suit, Appellant filed the instant claim in the Circuit Court for Prince George's County, Maryland. Appellee removed the action to the United States District Court for the District of Maryland. On or about

May 16, 2005, Appellant filed his Second Amended Complaint. Soon thereafter, Appellee filed its Motion to Dismiss. A hearing on Appellee's Motion to Dismiss was held on June 21, 2005 before Judge Roger Titus. At the conclusion of the hearing, Judge Titus granted Appellee's Motion to Dismiss, accepting Appellee's argument that (1) requiring Appellant to undergo an IME did not constitute an adverse employment action and that (2) Appellant's termination was not casually connected to his EEO claim but to his refusal to undergo the IME.

Appellant timely filed his notice of appeal, which was docketed before this court as 05-1760. This Court affirmed in part, vacated in part, and remanded the matter for further proceedings. Specifically, this Court found that the District Court had erred in granting the University's motion to dismiss Appellant's retaliatory discharge claim, stating that the 10-week lapse of time sufficiently established a prima facie case of retaliation. The Court then remanded for further proceedings as to whether a casual connection existed between the termination and Appellant's prior EEO activity.

On remand, the parties did not reopen discovery. Appellee filed a Motion for Summary Judgment. A hearing on Appellee's Motion for Summary Judgment was held on January 22, 2007 before Judge Roger Titus. At the conclusion of the hearing, Judge Titus granted Appellee's Motion for Summary Judgment, accepting Appellee's argument that the adverse employment action – the termination – was not casually connected to his EEO claim but to his refusal to undergo the IME.

Appellant timely filed his notice of appeal and is again before this Court.

**Issue 1**

The District Court erred in finding no relationship between Appellant's filing of an EEO complaint and the termination decision. Specifically, the District Court erred in finding that the request for the IME was justified based on the content of Appellant's EEO complaint. Appellant has an absolute right to participate in the EEO process and file a claim where he believes he has been wronged; no matter what the merits of the claim may be determined, there can be not retaliation for filing it. *See Childress v. City of Richmond,* 120 F.2d 476 (4th Cir. 1997). There was sufficient evidence in the record that Appellant understood there would be no further IME demands. (Docket Entry 62, Exhibit A, Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, Affidavit of Lawrence Silva). This was not a vague allegation by Appellant. The demand for the IME was a material breach of the settlement agreement as in Appellant's prior EEO activity. The elimination of the IME as a condition of reemployment was clear. (See attached correspondence from Miller and Obayashi Mediation, LLC who assisted in reaching first settlement agreement from prior EEO claim.) The deposition testimony submitted by Appellee in support of its motion also corroborates Appellant's belief that the IME would only be used to justify another termination, as it had been used before. *See* Docket Entry 58, Exhibit C, Deposition testimony of Lawrence Silva, at 42-43; *see also* attached IME reports used to justify Ap-

pellant's prior termination; 6/10/99 memorandum from Dr. Henry Raymond about use of IME to justify termination. Therefore, there was sufficient evidence, if viewed in the light most favorable to the non-moving party, to rebut the University's purported nondiscriminatory reason for the termination. The evidence was sufficient to show a dispute as to a material fact which should have been left for the jury to decide.

**Issue 2**

The District Court erred in finding that there was no indication that the Appellant's prior EEO complaints were of a similar nature. Specifically, in addition to Appellant's affidavit submitted in opposition to the motion for summary judgment, Appellee submitted deposition testimony that showed the similarity in the two EEO claims of harassment and violation of civil rights. *See* Docket Entry 58, Exhibit C, Deposition testimony of Lawrence Silva, at 43. The evidence was sufficient to show a dispute as a material fact, giving rise to an inference that the Appellee's reason for termination was mere pretext for retaliation.

**4. Relief Requested**

**What do you want the Court of Appeals to do? Identify exactly the relief you seek.**

Appellant requests that the Court of Appeals vacate the order granting Appellee's Motion for Summary Judgment and remand this matter to the District Court for further proceedings.

**5. Prior Appeals (for appellants only)**

**a.** Have you filed other appeals in this court?

___x___ Yes _____ No

**b.** If you checked YES, what are the case names and docket numbers for those appeals and what was the ultimate disposition of each?

___05-1760___

_____

**Signature**

[Notarization not Required]

_____

[Please Print Your Name Here]

CERTIFICATE OF SERVICE

You must serve your papers on appeal to all persons served in the lower court case and complete the following certification:

I certify that on 2/23/07 I mailed a complete copy of this Informal Brief and all attachments to all parties, addressed as shown below.

Sara Slaff, Esq.
Office of the Attorney General of Maryland
200 St. Paul Place
17th Floor
Baltimore, MD 21202

_____

Signature
[Notarization Not Required]